Painting on a broader canvas?
The need for a wider consideration of moral rights under EU law

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Introduction

EU law has yet to establish a coherent approach to moral, or non-pecuniary, rights. Moreover, what little attention EU law has paid to moral rights has generally ignored their fundamental rights aspects. This is surprising, given the significance of the fundamental rights of dignity and privacy and the manner in which they blend into moral rights. Moral rights stem from Article 6*bis* of the Berne Convention[1], form an important element within *droit d'auteur* systems of copyright[2] and are based on authorial autonomy. Moral rights provide protection against the derogatory treatment of copyright works in order to safeguard an author's honour and reputation. They enable authorial attribution with respect to those works and, in some jurisdictions[3], a right to determine their disclosure and withdrawal. There is a strong linkage between the concept of authorial autonomy that underpins moral rights and the EU fundamental rights of dignity and, to some degree, privacy. Moreover, whilst dignity is a difficult concept, it is an expansive one that can embrace self-respect, the right to respect from others, autonomy, privacy, integrity and self-determination[4]. Dignity operates as a constitutional value under EU law and has an interpretative role in relation to EU free movement, competition law and copyright

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[1]The Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886 revised at Rome on 2nd June 1928, revised at Brussels on 26th June 1948, and revised at Stockholm on 14th July 1967; concluded at Paris on 24 July 1971. The1928 revisions provided protection for non-pecuniary or moral rights. The Berne Convention is administered by the World Intellectual Property Organization (WIPO).

[2]The French term *droit d'auteur* (German *Urheberrecht*) is generally used in relation to the copyright laws of civil law countries (and more recently the EU law approach to copyright) that focuses on the autonomy of authors and their intellectual creativity. It can be contrasted with the copyright laws of common law countries, such as the United Kingdom and Ireland, where the interests of the copyright owner tend to receive more favourable treatment and where there is a greater focus on the economic interests associated with copyright.

[3]Under French law, for example, an author has a right of non-divulgation (Article L 121-2 of the Code de la Propriété Intellectuelle of 1 July 1992) and withdrawal (Article 121-4 of the Code), as to withdrawal, the author can prevent further reproduction, distribution or representation in return for compensation paid to the distributor of the work for the damage that may have been caused to him.

[4]See, for instance, Catherine Dupré 'Commentary on the Articles of the EU Charter Article 1 – Human Dignity' in 'The EU Charter of Fundamental Rights: A Commentary' Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (editors) (Hart 2014) at p. 19

harmonising measures, all of which have the capacity to interact with moral rights. This article will argue that the EU should recognise the association between dignity and autonomy-related moral rights far more explicitly. This, in turn, could facilitate the harmonisation of moral rights in the EU, particularly with respect to those EU Member States, such as the United Kingdom and Ireland, which have failed to introduce non-pecuniary interests in an entirely adequate manner at national level.

The EU Court of Justice ('CJEU')[5] and the EU General Court ('GCEU')[6] have almost entirely ignored moral rights when addressing copyright issues. Despite the close association between fundamental rights of dignity and privacy and moral rights, the CJEU has paid scant attention to these aspects[7], having instead concentrated on the issue of copyright originality[8]. Whilst the CJEU has emphasised the key role of an author's intellectual creativity when determining copyright originality, it has failed to consider how this creativity is in turn dependent on the authorial autonomy that moral rights promote, an attribute which is potentially buttressed by the fundamental rights of dignity and privacy. The approach of the EU courts is a startling one. The fundamental right of freedom of expression has received judicial consideration[9] and, if the EU courts are prepared to address that fundamental right,

[5]The CJEU is the superior EU court established under Article 19 TEU, with responsibility for the uniform application and interpretation of EU law, acting in cooperation with EU Member State judiciaries, which may refer issues of interpretation of EU law to it under Article 267 TFEU. It hears appeals from the junior EU court, the General Court of the EU, relating to decisions taken by the EU Commission in the latter's role as the primary enforcer of EU competition law. The mechanism enabling a court or tribunal of a Member State (and requiring a national court or tribunal of last resort) to refer matters of interpretation to the CJEU has enabled the CJEU to develop important legal doctrines, such as that of direct effect and supremacy, which have elevated certain forms of EU law above national law and have resulted in the conferral of certain rights and remedies on private parties, including a right of redress if harmed by a practice in breach of EU competition law.

[6]The GCEU, also established under Article 19 TEU, has the task of ensuring that the law is observed in the interpretation and application of EU law. The GCEU is the EU court of first instance having jurisdiction to hear appeals against competition law decisions adopted by the EU Commission.

[7]Cases 55 & 57/80 *Musik-Vertrieb Membran GmbH v GEMA* [1981] ECR 147 (at paragraph 12) when the CJEU acknowledged that "copyright comprises moral rights" of the kind indicated by the French Government in that case. However, the CJEU chose to concentrate on the fact that copyright "also comprises other rights, notably the right to exploit commercially", when addressing a free movement issue. Advocate General Warner similarly chose to focus on the cross-border sale aspect of the case.

[8]For example, Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569*;* Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 Case C393/09 *Bezpečnostní softwarová asociace v Ministerstvo Kultur*y [2010] ECR I-13971; Joined Cases C-403 and 429/08 *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services* [2011] ECR I-9083

[9]For example in Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker* where, in the context of the Information Society Directive (Directive 2001/29/EC), the CJEU held that whether the posting on a website of hyperlinks to protected works, which were freely available on another website (without the copyright holder's consent), constituted a 'communication to the public' depended on whether those links were

they should also engage in a broader consideration of other fundamental rights, such as dignity and privacy, recognising their close association with moral rights and given that dignity is a foundational value of the EU.

This article will depict the moral rights conferred by the Berne Convention and the treatment of the Convention by the CJEU, which has focused on the pecuniary rather than the moral rights associated with it. The article will consider how the moral rights created by the Berne Convention have been stripped of much of their meaning in certain common law Member States, an erosion of the dignitarian aspects of those rights that the CJEU has done little to rectify. It will assess the copyright law of the United Kingdom and Ireland, which have approached moral rights tentatively. The United Kingdom, in particular, has implemented moral rights in a narrow and tortuous way, with English courts focusing on an economic evaluation of, what should be, dignitarian issues. The article will analyse how a dignitarian-based approach to moral rights could help to address these shortcomings and facilitate the promotion of fundamental rights and the harmonisation of moral rights within the EU.

The historic reluctance of the EU courts to address moral rights divergences (in order to achieve a balance between the various interests on which they impinge) may well be driven by a concern that the task is too complex and insufficiently susceptible to judicial intervention. The article accordingly concludes that the issue is probably one that should be addressed by overarching EU legal measures and that a greater focus on relevant fundamental rights might act as a unifying force and could act as a platform for greater legislative harmonisation in this field. Since much of EU jurisprudence and EU legislative endeavours to date have focused on the economic aspects of copyright, bringing fundamental rights more to the fore in the context of copyright and moral rights offers an opportunity for harmonisation within the EU by reference to principles that recognise copyright's pecuniary and non-pecuniary aspects. Dignity and privacy rights undergird the General Data Protection Regulation ('GDPR')[10] and the GDPR offers an example of how

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provided free of charge by a person who did not know or could not reasonably have known the illegal nature of the publication of those works. The CJEU sought to balance "31. … on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter … ".

[10]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016 [2016] OJ L 119/1 4.5.2016

fundamental rights can act as a stable platform for harmonisation, one that has balanced data protection and privacy concerns whilst also seeking to address the need for data utilisation and free movement. Recognising that the harmonisation of copyright within the EU is likely to require the adoption of a Regulation, the GDPR thus points the way to how both pecuniary and non-pecuniary rights could be calibrated in this context.

Academic focus to date

Whilst much has been written about the economic and legal issues relating to the interaction between EU Member State copyright laws, EU copyright law harmonisation programmes and EU jurisprudence generated in the context of EU free movement[11] and competition law[12], there has been little academic consideration of copyright's underlying non-pecuniary, or moral rights in an EU law context. Thus there has been little or no evaluation of moral rights by reference to the fundamental right of dignity or privacy, nor as to whether such a focus both prompts the need for a greater emphasis on moral rights within the EU legal order and indicates a legal basis for the harmonisation of pecuniary and non-pecuniary rights.

Commentators have focused on moral rights by reference to two aspects. First, they have tended to analyse the differing methods of implementing moral rights at the national level under the Berne Convention and the absence of any harmonised approach. Second, when

[11]David T. Keeling 'Intellectual Property Rights in EU Law: Volume I Free movement and Competition Law (Oxford University Press 2003); Giuseppe Mazziotti 'EU Digital Copyright Law and the End-User' (Springer 2008); Benedetta Ubertazzi 'The Principle Of Free Movement Of Goods: Community Exhaustion and Parallel Imports' in 'EU Copyright Law: A Commentary' (Elgar Commentaries Series) Irini A. Stamatoudi and Paul Torremans (editors) (Edward Elgar 2014) at pages 38 to 51; Justine Pila and Paul Torremans 'European Intellectual Property Law' (Oxford University Press 2016) at pages 51 to 56

[12]For example, P. Aghion, N. Bloom, R. Blundell, R. Griffith and P. Howitt 'Competition and Innovation: An Inverted-U Relationship' (2005) 120 Quart J of Econ 71; L. Peeperkorn 'IP Licences and Competition Rules: Striking the Right Balance' (2003) 26 World Competition 527; S.D. Anderman and J. Kallaugher 'Technology Transfer and the New EU Competition Rules: IP Licensing after Modernisation (Oxford University Press 2006); Josef Drexl (editor) Research Handbook on Intellectual Property and Competition Law Edward Elgar 2008; Jochen Lorentzen and Peter Møllgaard 'Competition Policy and Innovation' in Bianchi, Patrizio and Labory, Sandrine (editors) International Handbook on Industrial Policy (Edward Elgar 2006); Ian Forrester 'Regulating Intellectual Property Via Competition? Or Regulating Competition via Intellectual Property?' Competition and Intellectual Property: ten years on, the debate still flourishes' in Ehlermann and Atanasiu (editors), European Competition Law Annual 2005: the Interaction Between Competition Law and Intellectual Property Law (Oxford: Hart, 2007); Steven Anderman and Ariel Ezrachi (editors) 'Intellectual Property and Competition Law: New Frontiers' (Oxford University Press 2011); Steve Anderman and Hedvig Schmidt 'EU Competition Law and Intellectual Property Rights: The Regulation of Innovation' (Cambridge University Press 2nd edition 2011); Jonathan D.C. Turner 'Intellectual Property and EU Competition Law' (Oxford University Press Second Edition (2015).

addressing the potential tension between fundamental rights and copyright (including, to a very limited degree, moral rights), commentators have frequently done so by reference to the right to freedom of expression. For instance, Treiger-Bar-Am has explored the moral right of integrity as a form of freedom of expression but has not evaluated this right by reference to dignity[13]. The treatment of human rights and intellectual property to be found within the Edward Elgar Research Handbook on Human Rights and Intellectual Property[14] only addresses the issue of dignity by reference to the development of patented medicines[15]. Geiger has also briefly highlighted[16] the exclusion from patentability of those processes that offend against human dignity under the EU Directive on the legal protection of biotechnical inventions[17]. More typical are authors such as Halpern and Johnson[18], who have focused on the role of Article 17(2) of the Charter of Fundamental Rights (the 'Charter')[19] in protecting intellectual property rights and the protection of freedom of expression under Article 11. Peers *et al*, in their extensive analysis of the Charter[20], do not address the issue of moral rights and dignity. Hence, the concept of moral rights as comprising a fundamental right that is linked to dignity remains relatively unexplored. This is a gap in the literature that this article will seek to address through a fuller consideration of the concept of dignity and authorial autonomy.

Dignity and Kant's moral philosophy

[13]Leslie Kim Treiger-Bar-Am 'The Moral Right of Integrity: a Form of Freedom of Expression' in 'New Directions in Copyright: Volume 2' Fiona Macmillan (editor) (Edward Elgar 2007)

[14]'Research Handbook on Human Rights and Intellectual Property' Christophe Geiger (editor) (Edward Elgar 2015)

[15]Aurora Plomer 'Human Dignity and Patents' in Research Handbook on Human Rights and Intellectual Property' *ibid* at pp. 479 to 495

[16]Christophe Geiger ' The Constitutional Dimension of Intellectual Property' in 'Intellectual Property and Human Rights' Paul C. Torremans (editor) (Kluwer Law International 2008) at page 116, footnote 73

[17]Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L 213/13 30.7.1998 Recital (38): "Whereas the operative part of this Directive should also include an illustrative list of inventions excluded from patentability so as to provide national courts and patent offices with a general guide to interpreting the reference to *ordre public* and morality; whereas this list obviously cannot presume to be exhaustive; whereas processes, the use of which offend against human dignity, such as processes to produce chimeras from germ cells or totipotent cells of humans and animals, are obviously also excluded from patentability;"

[18]Sheldon Halpern and Phillip Johnson 'Harmonising Copyright Law and Dealing with Dissonance: A Framework for convergence of US and EU Law' Edward Elgar 2014 at page 135.

[19]Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) p. 391 26.10.2012

[20]'The EU Charter of Fundamental Rights: A Commentary' Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (editors) (Hart 2014)

The concept of dignity encompasses the qualities ascribed to it by Kant, namely autonomy, the right for individuals not to be treated as "… a mere means of use for others … "[21], with dignity representing "… a basic standard for personal relations… "[22].

Human dignity is central to Kant's moral philosophy, which has at its heart the principle that a rational will must be regarded as autonomous, or free, and which is grounded in the view that each human is possessed of equal worth and is worthy of equal respect. In his 'The Metaphysics of Morals' Kant stated that:

> "Humanity is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists … But just as he cannot give himself away for any price (this would conflict with his duty of self-esteem), so neither can he act contrary to the necessary self-esteem of others, as human beings, that is, he is under obligation to acknowledge in a practical way, the dignity of humanity in every other human being … "[23].

Kant's philosophy makes clear the relationship between dignity and autonomy and has been viewed as offering the most apposite theoretical justification for intellectual property law[24]. Its emphasis on autonomy envisages the freedom in which an author's thoughts and ideas can be transformed into fully realised form and it anticipates a space in which authors' imaginings can find their ultimate expression. Merges believes that Kant's philosophical insights aptly express and reflect the frequently intangible nature of both the creative act and the fruits of that creativity. Kant's philosophy provides a clear linkage between the autonomy and dignitarian rights and its perception of dignity is consistent with the concept as understood within the EU legal order.

Dignity as an EU constitutional value

Certain constitutions recognise human dignity as a constitutional value but not as a right and, where both of these are acknowledged constitutionally, the value may be regarded as

[21]Thomas E. Hill, Jr. 'Kantian perspectives on the rational basis of human dignity' in 'The Cambridge Handbook on Human Dignity: Interdisciplinary Perspectives' Marcus Düwell, Jens Braarvig, Roger Brownsword and Dietmar Mieth (editors) (Cambridge University Press 2014) at page 219
[22]*Ibid* at page 221.
[23]Immanuel Kant 'The Metaphysics of Morals' (Cambridge University Press 2009) at page 209
[24]Robert P Merges 'Justifying Intellectual Property' (Harvard University Press 2011).

having a broader scope than the right, as is the case in the German constitution[25]. The exact meaning of the value or the right of dignity is to be ascertained from the express or implied meaning of the relevant constitution, as interpreted judicially[26], with constitutional structure playing "a role in interpreting both … "[27].

Within the EU legal order, Article 2 of the EU Treaty ('TEU')[28] states that one of the foundational values of the EU is "respect for human dignity". Article 1 of the Charter declares that human dignity is "inviolable" and a right that "must be respected and protected." The preamble to the Charter refers to the EU being founded on "indivisible, universal values" that include human dignity and emphasises that the individual is to be placed "at the heart" of the EU's activities. Dupré is of the view that Article 1 of the Charter renders human dignity " … the first right and principle … " of the Charter and that Article 2 TEU constitutes it as " … the very first foundational value of the EU … ", which she regards as a form of codification " … at the EU's highest normative level … " of strong dignity commitments that exist in almost all Member States.[29] She considers the normative strength of dignity to be substantial. However, this strength is not matched by precise semantic or theoretical qualities[30], with the exact meaning of dignity as a value requiring greater judicial elaboration.

Further clarity as to the meaning of the right to dignity is provided by the 2010 Annual Report on the Charter's application[31] (and by the Reports for 2011, 2012 and 2013, which express the right in similar terms to those used in 2010). This definition echoes Kant's philosophy:

> "Human dignity is the basis of all fundamental rights. It guarantees the protection of a human person from being treated as a mere object by the State or by his fellow

[25]Aharon Barak 'Human Dignity: The Constitutional Value and the Constitutional Right' (Cambridge University Press 2015) who categorises dignity as being a social value, a constitutional value and a constitutional right, with the constitutional right being based on, but not being identical to, the constitutional value of human dignity (see pages 11 to 14).
[26]*Ibid* pages 73 to 74
[27]*Ibid* page 80
[28]Consolidated Version of the Treaty on European Union, 2012 O.J. (C 326) p. 13 26.10.2012,
[29]Catherine Dupré 'The Age of Dignity: Human Rights and Constitutionalism in Europe" (Hart Publishing 2015) at page 3
[30]Catherine Dupré *op cit*. note 4 at pages 3 and 25.
[31]2010 Annual Report from the Commission on the Application of the EU Charter of Fundamental Rights

> citizens … None of the rights laid down in the Charter may be used to harm the dignity of another person."[32]

This elevation of dignity as a powerful right makes clear that dignity is to take precedence over other rights such as freedom of expression, which may not be used to undermine it. It also shows a clear association with autonomous behaviour, the latter being described by Christman as: " … a cornerstone of basic rights and freedoms fundamental to the dignity that we owe to each other…"[33]. He distinguishes "control rights from income rights"[34]. His language suggests that those elements of a work that are more closely associated with autonomy and self-expression merit greater protection, based on fundamental rights, than those economic elements associated with a work (for which ownership is the most appropriate claim). This tallies with Woods' observation, namely that the CJEU has seemingly ascribed a lower value to communications such as advertising as compared with other, less commercial, forms of expression[35] in the context of the right of freedom of expression.

The CJEU has not yet developed a significant body of jurisprudence regarding the meaning of 'dignity', particularly as a foundational value under Article 2 TEU. However, there is a clear relationship between privacy, autonomy and the space within which authorial creativity can be expressed. Privacy also has close links with dignity rights.

Privacy

Article 7 of the Charter provides that:

> "Everyone has the right to respect for his or her private and family life, home and communications."

[32]2010 Report on the Application of the EU Charter of Fundamental Rights EU Commission Justice available at:
http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm
(accessed 21 May 2017).
[33]John Christman 'Autonomy, social selves and IP claims' in 'New Frontiers in the Philosophy of Intellectual Property' Annabelle Lever (editor) (Cambridge University Press 2012).
[34]*Ibid* at page 45.
[35]Lorna Woods 'Article 11 – Freedom of Expression and Information' in 'The EU Charter of Fundamental Rights: A Commentary' Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (editors) (Hart 2014) in 'The EU Charter of Fundamental Rights: A Commentary' Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (editors) (Hart 2014) at page 337

This is rather more narrowly configured than the right to privacy established by the Universal Declaration of Human Rights[36] ('the Declaration'), Article 12 of which states more expansively that:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

The more extensive wording of Article 12 of the Declaration indicates that there is room for a dignity-related and reputation-based right in the context of privacy, thus providing a connection with the dignity value under Article 1 of the Charter.

Article 8 of the European Convention on Human Rights ('ECHR')[37] requires that a person's right to a person's "private and family life, his home and his correspondence" be respected. The language of Article 8(1) ECHR confers a right to privacy in almost identical language to that of Article 7 of the Charter. Under Article 52(3) of the Charter, rights corresponding to those guaranteed by the ECHR must be interpreted in similar fashion, without prejudice to the possibility of more extensive EU protection. Whilst Article 8 ECHR does not explicitly confer a right to honour or reputation, the right to protection of reputation has been established as a Convention right under Article 8 ECHR. In the case of *Pfeifer v. Austria*[38], the European Court of Human Rights held that:

> "33. As to the applicability of Article 8, the Court reiterates that "private life" extends to aspects relating to personal identity, such as a person's name or picture, and furthermore includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life".[39]

[36]Declaration adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris.
[3737]Signed in Rome on 4 November 1950
[3838]Application no. 12556/03 [2007] ECHR 935
[3939]Citing *Von Hannover v. Germany*, application no. 59320/00, [2005] ECHR 555

It concluded that, in this case, Austria had not done enough to protect the individual's reputation, which was " … an element of his "private life"…"[40]. Accordingly a person's right to protection of his or her reputation comprises part of the individual's right to respect for private life and is encompassed within Article 8 ECHR. The European Court of Human Rights has also ascribed dignity-related attributes to the right to private life in the *Botta* case[41].

In *A and others v East Sussex County Council*[42], the English High Court noted that in *Botta*[43], the European Court of Human Rights had " … identified a person's "physical and psychological integrity … " as being part of the private life protected by Article 8 …". The Court relied on the Declaration, the Charter and the ECHR in in holding that the concept of dignity was inherent in Article 8 of the ECHR and " … indeed in almost every one … "[44] of the ECHR's provisions. Munby J held that:

> "The invocation of the dignity … is not some meaningless incantation … it is a solemn affirmation of the law's and of society's recognition of our humanity and of human dignity as something fundamental."

Munby J categorised the right to dignity as a "… call to us to "act towards one another in a spirit of brotherhood …".[45] This obligation echoes sentiments expressed in rather more Kantian terms by the European Court of Human Rights in *Botta*, when it stated that:

> "32. … the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings."

These judgments establish a clear association between privacy, dignity and the space within which authorial creativity can be expressed. In their seminal article, Warren and Brandeis[46] depicted privacy as a basic fundamental right necessary for the development of a person as an autonomous individual. Benn has equated respect for a person as implying respect for that person as someone engaged in "a kind of self-creative enterprise" which could be disrupted by intrusion. Privacy rights demonstrate respect for the person "as an

[4040] *Ibid* at paragraph 38.
[4141] *Botta v Italy* (1998) 26 EHRR 241
[42] [2003] EWHC 167 (Admin)
[43] *Botta v Italy* (1998) 26 EHRR 241
[44] *Op cit* note 46 per Munby J at paragraph 86.
[45] *Ibid*
[46] Samuel D. Warren, and Louis D. Brandeis 'The Right to Privacy' *Harvard Law Review*, Vol. 4, No. 5 (Dec. 15, 1890), pp. 193--220

autonomous individual" or "chooser"[47]. There is a link in this respect between privacy, autonomy and moral rights. The latter includes (within French law[48]) a right of non-divulgation and withdrawal for authorial works. Violation of privacy is regarded as a failure to respect personhood and as treating a person as a means rather then an end, something to which the GDPR is strongly antagonistic. A lack of respect for privacy may be regarded as a mark or sign that that individual's enterprise is not one worthy of respect or consideration and, according to Kupfer:

> " … the individual feels the intrusion as a lack of respect … his projects and feelings, including feelings of self-worth, aren't important or valuable enough to check the other's intruding impulses. When we violate someone's privacy we don't respect him … we don't acknowledge the importance to the individual of his activity or the value of the individual himself."[49]

This language strongly links privacy with personal expression and dignity, sentiments that echo the respect for authorial works, including the moral rights associated with personal creativity. These views also suggest a utilitarian benefit, namely sufficient privacy and respect acting as a shield that will safeguard and engender productive enterprise.

The Charter and constitutional interpretation

Article 51 of the Charter states that its provisions are addressed to the EU institutions "and to the Member States … when they are implementing Union law … ", which must respect the Charter's principles and promote its application. Lenaerts and Gutiérrez-Fons consider that, since (by virtue of Article 2 TEU), " … the EU is founded on the value of respect for human rights, one could argue that fundamental rights operate as a 'meta-principle' of constitutional interpretation, ie (sic) primary EU law must be interpreted in light of fundamental rights." [50]

Article 3(6) TEU provides that the EU is to " … pursue its objectives by appropriate means commensurate … " with its Treaty competences. Although the EU's values and objectives do

[47]Stanley I. Benn, 'Privacy, Freedom, and Respect for Persons', in 'Privacy: Nomos XIII, ed.' J. Pennock and J. Chapman (Atherton Press, 1971), pp. 1--26.
[48]*Op cit* note 3, Article 121-4 of the Code
[49]Joseph H Kupfer 'Autonomy and Social Interaction' (State University of New York Press 1990) at page 141
[50]Koen Lenaerts and José Antonio Gutiérrez-Fons 'The Charter in the Constitutional Edifice' in 'The EU Charter of Fundamental Rights: A Commentary' Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (editors) (Hart 2014) at p. 1571

not independently create legally enforceable powers[51], dignity is a key value that should be fully reflected in the CJEU's role in interpreting EU harmonising measures and also in applying the free movement and competition law rules. Wyatt and Dashwood note that:

> "… the values and objectives set out in Articles 2 and 3 obviously perform an important and sometimes even a definitive role when it comes to interpreting the nature and the limits of the powers vested in the Union institutions."[52]

Thus, the concept of dignity should be invoked when interpreting EU law applicable to moral rights, given the clear association between the two.

Moral rights

There are two moral rights cited in the Berne Convention. Article 6*bis* provides that "Independently of the author's economic rights" and even after their transfer, the author has "the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation." These two rights are to endure after the author's death "at least until the expiry of the economic rights", with the "means of redress" being governed by the law of the country "where protection is claimed."

In addition to these authorial moral rights, Article 5 of the WIPO Performances and Phonograms Treaty ('WPPT') obliges the contracting parties to grant the moral rights of integrity and attribution to performers, thereby aligning the rights of authors and performers in this respect[53]. Article 5 WPPT provides that:

> "(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of

[51]Case C-9/99 *Échirolles Distribution SA v. Association du Dauphiné* [2000] ECR I-8207 and Case C-181/06 *Deutsche Lufthansa AG v ANA — Aeroportos de Portugal, S.A* [2007] ECR I-5903

[52]Wyatt and Dashwood's European Union Law (Hart Publishing 6th edition 2011) Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrik Wyatt at page 24 citing Case C-267/86 *Pascal Van Eycke v ASPA NV* [1988] ECR 4769, Case C-149/96 *Portugal v Council* [1999] ECR I-8395, Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089 and *Case C-166/07* European *Parliament v. Council [2009] ECR I-7135.*

[53]WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996)

the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

"(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights … ".

The Article reflects divergences in approach, not only between common and civil law traditions, but also within the latter. Although signatory states have a wide degree of latitude in the implementation of Article 6*bis*, nevertheless this discretion is not unbounded since, under Article 31(1) of the Vienna Convention[54], a treaty must be:

" … interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

There is scope to align national moral rights laws more closely around the civil law tradition. Adeney believes that the Vienna Convention requires the Article's ambiguous language to be interpreted by reference to the French *travaux preparatoires*, with terms such as "honour" being interpreted by reference to French notions of moral rights[55]. This would place a far greater emphasis on authorial autonomy and dignity and lessen economic considerations when the courts of signatory states interpret the scope of the moral rights conferred by Berne. It would also bring the treatment of moral rights into line with the EU jurisprudence relating to the level of originality meriting copyright protection, namely the need to demonstrate authorial intellectual creativity[56]. The focus on the autonomy of authors and their intellectual creativity is an approach that can be termed 'author-centric'. It would appear to be inconsistent to focus on this as the relevant standard for the exercise of

[54]Vienna Convention on the law of treaties; concluded at Vienna on 23rd May 1969

[55]Elizabeth Adeney 'The moral right of integrity: the past and future of "honour'' (2005) IPQ 111 citing Article 37(1)(c) of the Berne Convention (French text is determinative) and Article 31 of the Vienna Convention. See Ulf Linderfalk 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' Eur. J. Int. Law (2015) 26 (1): 169-189. Linderfalk states (at page 170) that; "Article 31 [of the Vienna Convention] stresses the importance of conventional language, adding that terms of a treaty must also be interpreted in their context and in light of the treaty's object and purpose. Article 32 confirms that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion." See also Francis G. Jacobs 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' 18 ICLQ, (April 1969) pp. 318 to 346 regarding canons of interpretation.

[56]For example, Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569*;* Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 Case C393/09 *Bezpečnostní softwarová asociace v Ministerstvo Kultur*y [2010] ECR I-13971; Joined Cases C-403 and 429/08 *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services* [2011] ECR I-9083

copyright's pecuniary rights and yet not regard it as the appropriate basis for the exercise of moral rights.

The CJEU's treatment of the Berne Convention

Whilst the EU is not a party to the Berne Convention, the CJEU has had regard to it in its judgments, largely by reference to economic rights. In *Commission v Ireland*[57], the CJEU concluded that compliance with the Convention was subject to its review[58] in relation to Ireland's obligation to comply with the Berne Convention under the EEA Agreement[59], to which it was then subject. In that case, Advocate General Mischo also accepted the EU Commission's argument that many EU Directives were intended to implement the Berne Convention's provisions[60], including Directive 93/98[61], which harmonised the term of protection of copyright covered by Articles 7 and 7A of the Berne Convention. The CJEU has also relied on concepts inherent within the Berne Convention, using employed language used in the Convention to address the issue of originality ("author's own intellectual creation") as an autonomous EU concept in *Infopaq*[62]*.* The CJEU focused on the author-centric nature and creative qualities of the works to which national copyright should attach[63], even when the relevant directive did not seek to address this specifically[64]. This has in turn has resulted in the English courts, for instance, moving towards a more author-

[57]Case C-13/00 *Commission v Ireland* [2002] ECR I-2943

[58]Ibid at pargraph 19: "The Berne Convention … creates rights and obligations in areas covered by Community law. That being so, there is a Community interest in ensuring that all Contracting Parties to the EEA Agreement adhere to that Convention." Advocate General Misch also accepted the Commission's submission that EU Directives also

[59]Agreement on the European Economic Area [1994**]** OJ L 1/3 3.1.1994

[60]Those cited were: Council Directive 91/2J0/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42); Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61); Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15); Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9), and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

[61]Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9)

[62]Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569

[63]For example, Case C-5/08 *Infopaq ibid;* Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533 Case C393/09 *Bezpečnostní softwarová asociace v Ministerstvo Kultur*y [2010] ECR I-13971; Joined Cases C-403 and 429/08 *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services* [2011] ECR I-9083

[64]Case C-406/10 *SAS Institute v World Programming Ltd* at paragraph 45: SAS language and format of SAS data files *might* be protected as works under Directive 2001/29 if they were their author's own intellectual creation.

centric test when establishing the originality of a work that would enable it to gain copyright protection[65].

These judicial developments are an indicator that, although the EU is not a party to the Berne Convention, the CJEU could nevertheless use the Berne Convention concepts of honour and reputation in order to harmonise moral rights more fully within the EU. Thus, it could employ fundamental rights (such as that of dignity and potentially privacy), in conjunction with reputational concepts inherent in the Berne Convention to shape EU moral rights in the future and thereby achieve greater levels of harmonisation, notwithstanding the current divergent approaches adopted at national level within the EU, particularly with respect to EU Member States that have common law traditions.

Moral rights and divergent national treatment

Both the United Kingdom, currently an EU Member State, and Ireland as common law countries have tended to focused on the economic aspects of copyright and to ignore the dignitarian or reputational aspects of moral rights. This is an approach that is evident in the United Kingdom's copyright legislation and in related English jurisprudence. True adherence to Article 6*bis* of the Berne Convention requires a much greater focus on non-pecuniary or moral rights than either the legislature or English judiciary has displayed so far. The relevant provisions of the United Kingdom's Copyright Designs and Patents Act 1988 ('CDPA') are an inadequate attempt to implement Article 6*bis* of the Berne Convention, being hedged about with formalities, such as the need to assert the right of paternity or attribution[66] and the inclusion of a right to waive either of these rights[67]. Employees' moral rights are

[65]In *SAS Institute* [2013] EWCA Civ 1482, at paragraphs 31 and 33, the Court of Appeal drew on the CJEU's jurisprudence to conclude that the "essence of [intellectual creation] is that the [author] has exercised expressive and creative choices in producing the work. The more restricted the choices, the less likely it is that the product will be the intellectual creation (or the expression of the intellectual creation) of the person who produced it". The requirement of originality would not be satisfied if the expression was dictated by technical functionality. This has undermined the more liberal traditional test for originality under UK copyright law, namely 'labour, skill and judgment'.

[66]For example, as regards the paternity right, the relevant work must (in general terms) have been published commercially or communicated (or issued) to the public (ss.77(2)-(4) CDPA); the author must first assert his right of paternity (s.78(1)) (delays potentially undermine that right) (s.78(5)); as regards public exhibitions of an artistic work, assertion occurs where the author is identified on the original copy, frame or mount (s.78(3)); assertions must otherwise be through an instrument in writing signed by the author or director, or in an assignment or licence of the work (s.78(2)); if the assertion is by instrument in writing (not being by way of assignment or licence), notice of it must be given to third parties (s.78(4)(b))This contrasts with Article 6*bis*, which provides that the author has "the right to claim authorship of the work" and with Article 5(2), which prohibits formality requirements.

[67]S. 87 CDPA

automatically ascribed to their employer[68]. In implementing Article 6*bis* of the Berne Convention, the relevant provisions of the CDPA largely undermine moral rights and Norman considers that, in implementing Article 6*bis*: "Parliament has twisted a straightforward personal right into a complex commercial transaction."[69] The UK has had appreciable difficulty in establishing clear statutory and jurisprudential principles that meaningfully address the non-pecuniary rights of authors. English law continues to view an author's integrity as reputation-based, to be assessed from the point of view of the public at large and rooted in the tradition of economic torts, such as defamation or passing off. The English courts have regarded an author's views as too subjective a yardstick[70], and have shown little consideration for authorial sensitivities. In *Pasterfield v Denham*[71], Overend J considered the statutory reference to 'honour and reputation'[72], a key a factor in determining whether authorial work has been subject to derogatory treatment, and concluded that it was "not sufficient that the author is himself aggrieved by what has occurred".

The United Kingdom has implemented[73] Article 5 WPPT and conferred moral rights of integrity and attribution on performers comparable to those granted to authors. It has also implemented the Related Rights Directive[74] in order provide performers with fully assignable property rights and certain rights to remuneration[75]. As with the moral rights granted to authors in relation to their copyright works, the performer's moral right of attribution must be asserted[76] and both the right attribution and to object to derogatory treatment may be waived[77]. The complexities associated with the rights as introduced by the United Kingdom have been criticised by Liu[78].

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[68]Ss. 11(2) and 82 CDPA

[69]Helen Norman "Intellectual Property Law" (Oxford University Press Second Edition 2014) page 271

[70]See, for example, *Pasterfield v Denham* [1999] FSR 168*,* where Overend J considered that, when interpreting the provisions of the CDPA implementing article 6*bis* Berne Convention, the relevant original artwork had been subject to 'treatment' but that this had not been 'derogatory'. The reference to 'honour and reputation' in the CDPA was held to be conjunctive and the judge noted that this was 'akin to libel'. The judge was unmoved by arguments based on Canadian and French judgments that favoured an artist-centered approach (*Snow v The Eaton Centre Ltd* 70 C.P.R. (2d) 105; *Huston v. Turner Entertainment* May 28, 1991 (I.I.C. Vol. 23 702)).

[71][1999] FSR 168

[72]Section 80(2)(b) CDPA

[73]Ss. 205C to 205N CDPA

[74]Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] L 376/28 27.12.2006.

[75]Ss. 191A to 191L CDPA

[76]S. 205D CDPA

[77]S. 205J CDPA

[78]Deming Liu 'Performers' rights: muddled or mangled? Bungled or boggled?' (2012) 34(6) EIPR 374.

Dworkin has remarked that moral rights "intruded" into the common law's economics-based copyright system[79]. Ireland, in keeping with the United Kingdom's approach, has also enacted legislation that only partially implements its obligations in relation to Article 6*bis*. For instance, the Copyright and Related Rights Act 2000 has qualified the paternity right. Whilst the Act does not contain the same convoluted requirements relating to the assertion of the right of attribution as those set out in the CDPA, the Act strips employees of their paternity rights[80]. In addition, the author has the right of protection against derogatory actions in relation to his or her work "which would prejudice his or her reputation"[81], with the Irish statute crucially omitting the necessary dignity-related reference to "honour". The Act introduces the moral right of paternity and the right to object to derogatory treatment in relation to performers[82], although as with the moral rights of authors, all these rights can be waived[83].

By way of contrast, French and German law each treat moral rights as "at least the equal of economic rights."[84] Under the French Code de la Propriété Intellectuelle of 1 July 1992 the non-pecuniary or moral rights conferred by the French legislation embrace rights of attribution, integrity, disclosure and withdrawal. Article L121-1 of the French Code provides that: "An author shall enjoy the right to respect for his name, his authorship and his work … " a right that attaches to his person and that " … is perpetual, inalienable and imprescriptible." This right to respect for the author's work is an extensive one, arising irrespective of the work's quality and prohibiting even seemingly unimportant alterations or modifications[85]. However, the French court must conduct a balancing exercise with respect to the right to respect for the work and subsequently acquired property rights[86]. Whilst not so obviously grounded in a constitutional right as is the case in German law, moral rights enjoy much greater protection than that available in common law countries, such as the United Kingdom and Ireland.

[7979]Gerald Dworkin 'The Moral right of the Author: Moral rights and the Common Law Countries' (1995) Columbia-VLA Journal of the Law and Arts 229

[80]Ss. 23 and 111(1) Copyright And Related Rights Act 2000

[81]S. 109 Copyright And Related Rights Act 2000

[82]S.s 309 and 311 Copyright And Related Rights Act 2000, respectively.

[83]S. 316 Copyright And Related Rights Act 2000

[84]Cornish, Llewellyn and Aplin 'Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights' Sweet & Maxwell Eighth Edition 2013 page 503

[85]*Sté TF1 c Sté Sony et autre* Cour de cassation, 1 Chambre civile 6 February 1998, (1998) 177 RIDA 212.

[86]*Bonnier c Sté Bull* Cour de Cassation,1 Chambre civile, 7 January 1992, (1992) 152 RIDA 194, in this case with the Cour de Cassation having regard to the utilitarian purpose of the building to which alterations had been made that offended the original architect.

Under German law the authorial right or personality is comprehended within Article 1 and 2 of the German Basic Law[87], "the German constitutional safeguard of human dignity"[88]. The creation of a work thus generates "both moral rights and economic rights."[89] German law is based on Hegelian principles and regards "the work as the fulfilled expression of the author's personality"[90] and provides moral rights with the same duration as their economic rights. Under section 14 of the Author's Rights Act[91], the integrity of an author's work must be maintained. The author has the right to prohibit distortions or impairments of his or her work that are apt to imperil his legitimate intellectual or personal interests in the work. The term 'legitimacy' involves a balancing of interests between author and the defending party, with "[t]he importance of the personality rights as giving expression to articles 1 and 2 of the Basic Law … always [being] either expressly or tacitly present in the consideration.[92]"

There is therefore a marked difference between the way in which certain Member States with a common law tradition (the United Kingdom and Ireland) have implemented moral rights, as compared with civil law countries, such as France and Germany. The nature of moral rights is rendered clearer by identifying their close association with fundamental rights, such as that of dignity, and such a focus also highlights the manner in which the laws of these common law Member States are at odds with these principles. This association between moral rights and fundamental rights also illuminates the way in which closer EU harmonisation of moral rights might proceed.

Copyright, moral rights and fundamental rights

Geiger has suggested constructing intellectual property rights from fundamental rights and human rights, which he believes "offer a synthesis of the bases of natural law and utilitarianism" and represent an "ideal basis from which to start"[93]. He has emphasised the fact that, whilst intellectual property is not explicitly mentioned in the Declaration, Article

[87]Grundgesetz für die Bundesrepublik Deutschland of 23rd May 1949 (the 'Basic Law'), Article 1(1) of which states that: "The dignity of man is inviolable. To respect and protect it is an obligation of all state power." Article 2(1) provides that: "(1) Everyone has the right to the free development of his personality insofar as he does not violate the rights of others and does not violate the constitutional order or the moral law."

[88]Elizabeth Adeney 'The Moral Rights of Authors and Performers: An International and Comparative Analysis' (Oxford University Press 2006) at page 224

[89]*Ibid* at page 225

[90]*Ibid*

[91]Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) of 9 September 1965.

[92]Adeney *op cit.* note 63 at page 247

[93]Christophe Geiger ' The Constitutional Dimension of Intellectual Property' in 'Intellectual Property and Human Rights' Paul C. Torremans (Kluwer Law International 2008) at page 111

27(2) states that everyone has the right to the protection of moral and material interests arising from those scientific, literary or artistic productions of which he is the author[94]. He regards fundamental rights as the appropriate framework for developing "a balanced framework" for intellectual property law (not least because they have been included in some national constitutions), with the property and personality rights inherent in intellectual property rights, for example copyright, needing to be aligned with fundamental rights such as freedom of expression, the right to privacy and human dignity.[95]

To the extent that moral rights can either be categorised as or be seen as associated with fundamental rights (for instance as a means for securing fundamental rights), the case for greater judicial attention becomes more pressing. Rosati has publicly questioned whether moral rights are, in fact, fundamental rights[96]. On the other hand, Kennedy considers that the references in Article 27(2) of the Declaration and the similarly worded Article 15 of the International Covenant on Economic, Social and Cultural Rights to the protection of an author's moral and material interests in his or her scientific, literary or artistic works are a basis for concluding that, even if " … these provisions may not mean that IPRs are human rights: the former can be seen as legal mechanisms in order to give effect to the latter … ". Thus, if moral rights lack the necessary qualities of universality, inalienability and indivisibility to constitute a fundamental right themselves, they should nonetheless be interpreted in order to give effect to fundamental rights, such as that of dignity[97].

Dignity is not just an authorial issue. It is also a feature of privacy and data protection law. A fundamental rights-based approach is an inherent part of the architecture of EU data protection legislation and it could also play a greater role in the context of copyright and moral rights. The GDPR has achieved a balanced approach to the protection of personal data, a fundamental right under Article 8(1) of the Charter'[98] and the EU's economic goals. Beyond its data protection remit, the GDPR has as its further aims the strengthening and

[94] *Ibid* at page 112
[95] *Ibid* at pages 115 and 116
[96] For instance in a presentation given by Eleanor Rosati on 12 February 2014, to The British Literary and Artistic Copyright Association at the offices of Bird & Bird LLP, entitled 'Are moral rights human rights?': available at http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwjq3ru_26jTAhXHtRQKHZqdAqIQFggpMAE&url=http%3A%2F%2Fwww.blaca.org%2FEleonora_Are%2520moral%2520rights%2520human%2520rights%2520BLACA%2520%28finale%29.pptx&usg=AFQjCNEnsofUtNpoFOW-Vr1gXTOBGKCWXw&sig2=3eEtNAInuPp-rDe70qv52g&bvm=bv.152479541,d.ZWM (accessed on 16 April 2017).
[97] Rónán Kennedy 'Was it author's rights all the time? Copyright as a constitutional right in Ireland' Dublin University Law Journal (2011)
[98] Recital (1) GDPR

facilitation of the convergence of the economies within the internal market and the attainment of "the well-being of natural persons"[99]. Recognising that the harmonisation of copyright within the EU is likely to require the adoption of a Regulation, the GDPR thus points the way to how both pecuniary and non-pecuniary rights could be calibrated in this context.

The GDPR strikes a Kantian note by stating that: "The processing of personal data should be designed to serve mankind."[100] The GDPR acknowledges that the right to the protection of personal data is not an absolute right and requires balancing with other fundamental rights in accordance with the principle of proportionality[101]. The emphasis within the GDPR is on generating adequate levels of protection that will create "the trust that will allow the digital economy to develop across the internal market.[102]" The legal centre of gravity is that of fundamental rights, with internal market considerations playing a secondary role. It is also noteworthy that fundamental rights must be balanced in accordance with the principle of proportionality. Such an approach would provide a fundamental rights-based platform for harmonising copyright and moral rights at an EU level that could be achieved in a balanced way and one that respects both pecuniary and non-pecuniary interests.

The CJEU was sympathetic to arguments in the *Google Spain* case[103] that it should require, under Directive 95/46[104], the withdrawal of data and the prohibition of access to certain data by the operators of search engines when that data was liable to compromise the fundamental right to data protection and the dignity of the data subject. Given that the interference with the privacy rights of the data subject was a serious one (the link, which the CJEU ordered should be removed, was to an extremely dated report regarding the forced sale of assets due to individual insolvency), the CJEU held that it was " … clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing … ".[105] Thus the fundamental right of privacy was linked to dignity and together these rights outweighed any economic arguments available to Google Spain in that case.

[99]Recital (2) GDPR
[100]Recital (4) GDPR
[101]*Ibid*
[102]Recital (7) GDPR
[103]Case C-131/12 *Google Spain SL & Google Inc. v Agencia Espanola de Proteccion de Datos & Mario Costeja Gonzalez*
[104]Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31 23.11.1995
[105]Case C-131/12 *Google Spain op cit.* note 94 at paragraph 81

EU hamonisation and copyright

The EU harmonisation programmes[106] have been introduced in order to facilitate single market integration and references to copyright have addressed the need to promote consumer choice, whilst preserving the economic incentives provided by copyright[107]. The EU has sought to achieve a balance between these competing EU goals and values in the context of copyright harmonisation. For instance, the EU directive on Copyright in the Information Society seeks to attain a balance between promoting single market integration, the stimulation of innovation in goods and services, whilst also maintaining respect for intellectual property as a fundamental right, along with "freedom of expression and the public interest "[108]. However, its focus has been on pecuniary rights, to the relative exclusion of moral rights. For example, Recital 5 of the Rental and Lending Rights Directive[109] strongly emphasises the economic aspects of copyright:

> "5. The creative and artistic work of authors and performers necessitates an income as a basis for further creative and artistic work, and the investments required … The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned."

[106]E.g. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] L 376/28 27.12.2006; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15 6.10.1993; Directive 2006/116/EC of The European Parliament and of The Council of 12 December 2006 on the term of protection of copyright and certain related rights L 372/12 27.12.2006.

[107]e.g. see the Information Society Directive op cit. note 9.

[108]Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 22.06.2001**,** Recital (1) to (3) of which provide:

"(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

"(2) The European Council [has] … stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

"(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest."

[109]Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] L 376/28 27.12.2006.

There is an increasing trend for directives relating to intellectual property to refer to fundamental rights[110]. For instance, Geiger has noted: " … that the obligation to interpret EU law in a manner compliant with fundamental rights is not restricted to directives, but extends to the whole *acquis communautaire*, including the articles of the Treaty … ". Woods has highlighted that directives such as the Audiovisual Media Services and E-Commerce Directives "specifically note the need to respect freedom of expression."[111] The CJEU has ruled that there is an obligation on Member States to balance copyright with fundamental rights in the context of the E-Commerce Directive[112] and the provision of information relating to alleged breaches of intellectual property rights and the enforcement mechanisms available under the Information Society Directive[113]. However, this trend has not entailed the evaluation of non-pecuniary rights, buttressed by dignity or privacy rights. For instance in *Promusicae v Telefónica de España SAU*[114] the balancing of fundamental rights was entirely by reference to economic interests. The case related to the conflict between the revelation of the identities and addresses of those believed to have infringed copyright (through the use of illegal Internet services) and data privacy. The CJEU noted that the E-Privacy Directive (Directive 2002/58)[115], sought to respect the fundamental rights set out in Articles 7 and 8 of the Charter and contained " … [t]he mechanisms allowing those different rights and interests to be balanced … [providing] for rules which determine in what circumstances and to what extent the processing of personal data is lawful and what safeguards … "[116] were required.

The Information Society Directive[117] expressly excludes moral rights from its ambit, leaving this issue to be addressed by the legislation of the Member States. In the *Deckmyn* case

[110] *Op cit.* note 103 at page 117
[111] Lorna Woods *op cit.* note 35 at page 313.
[112] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1.
[113] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.
[114] Case C-275/06 [2008] ECR I-271
[115] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L 201/37 Official Journal L 201/37 31.07.2002
[116] *Op cit.* note 124 at paragraph 66.
[117] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 22.06.2001**,**

Advocate General Cruz Villalón stressed[118] the need to balance the various Charter rights of human dignity, freedom of expression, freedom of the arts and sciences, the right to property, non-discrimination and cultural, religious and linguistic diversity when defining the autonomous EU concept of 'parody' under the Directive. The CJEU in *Deckmyn*[119] focused on the right of freedom of expression, a fundamental right most obviously in tension with copyright. Here freedom of expression in the context of a parody with racist overtones had an obvious effect on the integrity of a work and the dignity of its author with the potential for false attribution. The CJEU also considered that a there was a legitimate interest in ensuring that copyright work was not associated with potentially racially offensive messages contained in such a parody[120]. However, in a remarkably brief judgment the CJEU assessed this harmful impact by reference to the interests of the copyright owner, not the author. The CJEU probably felt unable to address moral rights directly, given that the directive explicitly excluded from its scope moral rights. The CJEU's assessment of the impact of parody on the dignity of the author inevitably involved a balancing of rights that implicitly involved non-pecuniary or moral rights[121].

The CJEU has avoided evaluating on moral rights in the past, combining them with economic rights in order to address free movement issues[122]. In *Musik-Vertrieb Membran*[123], it placed a strong emphasis on single market integration and economic rights issues when addressing the moral rights aspects of copyright. The case involved attempts by GEMA, a German copyright management society to prevent musical records and cassettes being imported into Germany, when these goods had already been placed on the market within the EU. The CJEU acknowledged the arguments of the French government that " … copyright comprises moral rights … " but chose to ignore these and gave all its attention to the economic aspects of copyright, " … notably the right to exploit commercially the marketing of the protected

[118] *Case C-201/13 Johann Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH and WPG Uitgevers België* at paragraph 73 of his Opinion.
[119] *Ibid*
[120] *Ibid* at paragraph 31 of its judgment
[121] Eleonora Rosati 'Just a laughing matter? Why the decision in *Deckmyn* is broader than parody' (2015) 52 *Common Market Law Review*, Issue 2, pp. 511–529
[122] In Joined Cases 55 and 57/80 *Musik-Vertrieb Membran GmbH v GEMA* [1981] ECR 147 paragraph 12
[123] Cases 55 & 57/80 *Musik-Vertrieb Membran GmbH v GEMA* [1981] ECR 147 (at paragraph 12) when the CJEU acknowledged that "copyright comprises moral rights" of the kind indicated by the French Government in that case. However, the CJEU chose to concentrate on the fact that copyright "also comprises other rights, notably the right to exploit commercially", when addressing a free movement issue. Advocate General Warner similarly chose to focus on the cross-border sale aspect of the case.

work, particularly in the form of licences granted in return for payment of royalties … "[124]. Although the EU courts have shown little interest in the issue of moral rights with respect to their single market judgments rulings, certain judgments of the CJEU and the GCEU in the context of EU competition law have touched on the merits of national copyright and have tentatively, but inconclusively, linked authorial creativity and moral rights.

EU competition law and authorial creativity

With respect to competition law, EU courts have have sought to constrain the economic rights associated with national copyright laws in order to ensure that copyright does not impede single market integration or segment or exploit markets, with a view to promoting consumer choice. The EU courts have, at the same time, sought to retain sufficient legal protection of copyright owners' economic rights in order incentivise innovation, which in turn is expected to benefit consumer welfare and European growth, an overarching goal under Article 3(3) TEU.

The judicial application of Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU') [125] has been inherently economic, with the CJEU eschewing a broader public interest based approach to Article 102 TFEU, for instance in *GlaxoSmithKline Services Unlimited v Commission*[126]. This judicial analysis has pivoted around the concept of copyright as a purely economic right, the qualities of which may inhibit single market integration but which may also enhance favourable EU economic developments. For instance, technological developments are specifically mentioned as pro-competitive factors to be borne in mind when considering the anti-competitive effects of agreements or mergers that fall within the EU's competition law jurisdiction under both Article 101(3)[127] and Article 2(1)(b) of the EU Merger Regulation[128]. Conversely, Article 102(b) TFEU views the suppression of innovation by a dominant undertaking as an anti-competitive abuse of that undertaking's market power. The focus has been on whether an intellectual property right,

[124] *Ibid* at paragraph 12.
[125] Consolidated Version of the Treaty on European Union, 2012 O.J. (C 326) p. 47 26.10.2012
[126] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P and as to which see Okeoghene Odudu 'The Wider Concerns of Competition Law' Oxford J Legal Studies (2010) 30 (3): 599
[127] Article 101(3) TFEU allows for the exemption of agreements or categories of agreements that may restrain competition but which improve the distribution of goods or technological progress, where the restrictions are proportionate, consumers benefit and there is an absence of substantial market power.
[128] Regulation 139/2004 OJ L 24, 29.01.2004, p. 1-22, Article 2(1)(b) of which provides that as part of any substantive assessment of a merger falling within the EU's jurisdiction, the EU Commission should take into account " … the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition."

such as copyright, has the capacity to allow an abusive exercise of market power[129] or the segmentation of markets[130]. Inherent in some of the competition law judgments of the CJEU and the GCEU is a tacit disapproval of national copyright lacking creative merit[131]. The GCEU in the *Magill* case sought to align both pecuniary and non-pecuniary rights when addressing the scope of copyright, remarking that the essential purpose of copyright was: " … to protect the moral rights in the work and ensure a reward for creative effort … "[132]. This attempt to highlight the underlying creativity needed to justify copyright and to indicate that the moral and economic aspects of copyright are linked was not supported by the CJEU, which passed over the issue. The CJEU focused on the need for copyright to respect the aims of EU competition law under Article 102 TFEU. A more overt shaping of copyright in the context of competition law was probably felt to be too controversial. The EU Commission's goal in competition policy is to seek a balance between copyright and competition as part of a drive for innovation. As former Commissioner for Competition Policy Joaquín Almunia has remarked: " … competition drives firms to look for a competitive edge and towards innovation … "[133]. To achieve this, the CJEU has avoided seeking to shape national copyright directly and has instead focused on mandatory licensing (an erosion of economic rights) in circumstances where it is attempting to foster greater follow-on innovation and satisfy consumer demand in a secondary market.

EU copyright harmonisation past, present and future

Recognising that some of the authorial aspects of copyright echo the concerns of moral rights (incentivisation and protecting creativity) and that an absence of harmonisation in this area could equally deter innovative effort, it would appear that the CJEU's silence regarding moral rights is not wholly explicable from its recent judgments. However, this reluctance may be a result of judicial concerns that, having harnessed EU competition law and the doctrine of exhaustion of rights to promote the communication and circulation of goods and

[129]Case *Magill TV Guide/ITP, BBC and RTE* OJ [1989] L78/43; Case C-241/91 P *RTE and ITP v Commission* [1995] ECR I-743; Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601

[130]Case 262/81 *Coditel SA v Cine Vogt Films SA (No. 2)* [1982] ECR 3381; Joined Cases C-403 and 429/08 *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services* [2011] ECR I-9083

[131]Valentine Korah 'The Interface Between Intellectual Property and Antitrust: The European Experience' 69 Antitrust L.J. 801, 811 (2001); Frank Fine 'European Community Compulsory Licensing Policy: Heresy versus Common Sense' 24 N.W. J. Int'l L & Bus. 619 (2003-2004).

[132]Case T-69/89 *Radio Telefis Eireann (RTE) v Commission* [1991] ECR II-485; Case T-70/89 *BBC v Commission* [1991] ECR II-535; Case T-76/89 *Independent Television Publications Ltd (ITP) v Commission* [1991] ECR II-575; at paragraph 58

[133]'Priming Europe For Growth' speech to the European Competition Forum, 2 February 2012.

services subject to copyright, too great a focus on moral rights (with their attendant authorial right of objection to derogatory treatment and, in France for instance, to non-divulgation and withdrawal) might inhibit these developments. There may also be judicial anxiety that the exercise of moral rights by authors might create greater prospective harm to investments in and the dissemination and utilisation of copyright. A further factor is probably the absence of any harmonising legislative programme that directly relates to the moral rights aspects of copyright. It can be argued that the CJEU has limited capacity to take the reform of copyright further. This is particularly so, given that much of its case law is necessarily limited to single market integration and competition law issues under the relevant provisions of the TFEU, which provide inadequate tools for comprehensive reform.

Existing Directives have acted as a springboard for interventions by the CJEU. The Information Society Directive[134] in particular, with its relatively broad harmonising scope, has led to a number of references to the CJEU. Thus, the *Infopaq*[135], *Painer*[136] and *Bezpecnostni*[137] cases have led to a focus on the author's own intellectual creation as the test of originality, with even a few words being adequate to enjoy copyright protection. The CJEU's ruling in *Infopaq*, for instance, was wider than that strictly required by the question referred to it. The author-centric approach adopted by the CJEU is entirely consistent with the underlying qualities of moral rights and suggests scope for far greater judicial creativity in the context of moral rights. Greater attention by the CJEU to the latter would aid harmonization and legal convergence at Member State level within the EU with respect to both pecuniary and non-pecuniary rights, whilst at the same time protecting creativity. Since the CJEU seems happy to adopt the concepts inherent in the *droit d'auteur* system for pecuniary rights, it seems entirely logical for it to do so with respect to non-pecuniary, or moral, rights as well.

Whilst Article 345 TEU has required that national intellectual property rights be respected, the territorial quality of partially harmonised national copyright[138] has caused it to be challenged under non-discrimination[139], free movement[140] and competition law rules.[141]

[134]Directive 2001/29/EC
[135]Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening*
[136]Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH*
[137]Case C393/09 *Bezpečnostní softwarová asociace v Ministerstvo Kultury*
[138]As upheld by the CJEU in Case C-192/04 *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable*
[139]E.g. Case C-92/92 *Phil Collins*
[140]E.g. Case C-78/70 *Deutsche Grammophon v Metro*

However, there are limits to the effectiveness of CJEU rulings in breaking down national disparities. The exhaustion of rights doctrine has limits, as demonstrated in *EMI Electrola GmbH v Patricia Im-und Export*[142], where EMI was able to invoke its unexpired copyright in Germany to prevent imports from Denmark of records no longer subject to Danish copyright protection. The CJEU expressly referred to the problems posed by inadequate harmonisation, according to Kur and Dreier "a hint" to embark on greater EU harmonisation[143], leading to the introduction of the Term Directive.[144] In addition, whilst the free movement rules have been applied to broadcasts in *FAPL v QC Leisure*[145], doubt remains as to whether this will capture all service-based business models. The application of EU competition law necessitates the finding of an anti-competitive agreement or market power and its abusive exercise[146].

A number of legal developments have rendered this a potentially propitious moment to contemplate the codification of EU copyright law. For instance, Chiou believes that codification at a EU or national level presents "the existing or desired law in a comprehensive, consistent, rational and systematic way"[147] comprising the consolidation of existing copyright directives "within a codified instrument"[148] (either embracing the law as it currently stands, or the updating of the EU '*acquis*') or the institution of uniform and comprehensive EU copyright legislation. The latter approach is regarded as overcoming the territorial quality of national (albeit partially harmonised) copyright, enhance transparency and as one that could "greatly reduce transaction and licensing costs."[149]

There have been suggestions that the time is right for codification in the Monti Report to the President of the EU Commission[150] and most recently the EU Commission has issued a Communication proposing codification (of the current copyright *acquis* or by the adoption of

[141]E.g. Case *Magill TV Guide/ITP, BBC and RTE* OJ [1989] L78/43; Case C-241/91 P *RTE and ITP v Commission* [1995] ECR I-743; Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601
[142]Case C-341/87 [1989] ECR 79
[143]European Intellectual Property Law: Text, Cases and Materials' Edward Elgar 2013 at page 246.
[144]Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ C372/12 27.12.2006
[145]Case C-403/08
[146]E.g. Joined Cases C-241/91 P & C-242/91 P *RTE & ITP v. Commission* [1995] E.C.R. 1-743 and Case T-201/04 *Microsoft Corp. v Commission* [2005] ECR II-1491
[147]Theodoros Chiou 'Lifting the (dogmatic) barriers in intellectual property law: fragmentation integration and the practicability of a European Copyright Code' (2015) EIPR 138 at page 141.
[148]*Ibid* at page 142
[149]Trevor Cook and Estelle Derclaye 'An EU Copyright Code: what and how, if ever?' (2011) IPQ 259
[150]Mario Monti 'A new strategy for the single market at the service of Europe's economy and society' 9 May 2010.

an optional unitary EU copyright title). The legislative landscape has also changed in the light of the reforms introduced by the Lisbon Treaty. Ramalho has noted that: "Article 118 TFEU … paves the way for the introduction of a European unitary copyright title, valid in all European member states"[151]. The Regulation could be adopted by a qualified majority and the language of Article 118(1), with its reference to "uniform protection", envisages a pan-European law.

This new power has been conferred contemporaneously with the publication of the Wittem Project European Copyright Code[152], providing an academic regulatory template that addresses originality, authorship and ownership, moral and economic rights and attendant limitations. Whilst the proposed Code is not without flaws[153], Rosati believes it achieves "a fair balance between common and civil law approaches to copyright."[154]

Conclusion

It has been argued that EU harmonisation has focused on "low hanging fruit" [155] and that future reform will have to tackle more ingrained national differences than those addressed to date. However, merely codifying the existing *acquis* will not, nor would an optional title be sure to, overcome the principal difficulties associated with the current state of EU copyright law.

Thus, the CJEU should either step up its discrete harmonisation of copyright law, including with respect to moral rights issues, or else the EU Member States should codify this field of law. The latter would enable the EU more easily to harmonise in a coherent and far-reaching way and one that would embrace moral rights in a manner that is reflective of the underlying fundamental right of dignity. A Regulation, such as that employed in the case of data protection, would allow a true alignment of all aspects of copyright (pecuniary and non-pecuniary rights) and the accommodation and balancing of fundamental rights, whilst also

[151]Ana Ramalho 'Conceptualising the European Union's competence in copyright – what can the EU do?' (2014) IIC 178 at pages 184 to 185.
[152]Available at: www.copyrightcode.eu
[153] See for instance Jane Grinsburg 'European Copyright Code – Back to First Principles' Columbia Law School January 2011. Auteurs et Medias (Belgium), 2011. Columbia Public Law Research Paper No. 11-261
[154]Eleanor Rosati 'Originality in EU Copyright: Full Harmonisation through Case Law' (Edward Elgar 2013) at page 225
[155]Trevor Cook 'A Unitary Copyright System for Europe? Impediments to Further Harmonisation and of any Transition to a Unitary System' Paper for joint BLACA/BCCS seminar 9 March 2010 available at: http://www.blaca.org/2010%20Cook%20-%20A%20Unitary%20Copyright%20System%20for%20Europe.pdf
(accessed 10 April 2017)

truing up single market integration considerations. Indeed, were such a Regulation to post-date the United Kingdom's exit from the EU, the loss of a Member state with a copyright law that has traditionally failed to focus on moral rights and authorial creativity may remove a potential impediment to future EU regulatory reform.